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THE COMPULSORY INITIATIVE AND REFERENDUM AND THE RECALL OF JUDGES

AN ADDRESS

BY

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IN THE SENATE OF THE UNITED STATES,
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Ordered, That the address of the Hon. Henry Cabot Lodge, entitled "The Initiative, Referendum, and Recall," delivered at Princeton, N. J., March 8, 1912, be printed as a Senate document.

Attest:

CHAS. G. BENNETT,
Secretary.
By H. M. ROSE,
Assistant Secretary.

THE COMPULSORY INITIATIVE, REFERENDUM, AND THE RECALL OF JUDGES.

In discussing a subject so momentous as the principles of government it is of great importance to determine at the outset exactly what we mean by the terms we use. Nothing is more dangerous, when we are trying through inquiry to arrive at direct results, than to be the slaves of words or phrases. We all believe in liberty, for instance, and desire to promote it, but explanatory words are needed for the liberty we mean, and the only liberty worth having is an ordered freedom and not the license which knows no law. The word "progress" has been much used of late in public discussion, but mere progress is not necessarily good. Everything depends on the direction in which the progress is made. We speak, for example, of the progress of a disease, which is a most undesirable progress either in a human being or in a body politic. Progress is our aim and purpose only when it means an advance from bad to good, from good to better, or from better to best. The word "people," again, in connection with the constitutional changes which have been advocated for the last few years, is also used in a misleading manner. The "people" referred to in the Constitution means all the people of the United States. "People" as referred to in popular discussion by those who favor radical alterations in our Constitution invariably means a majority of the voters, which is a totally different thing from the people. It is quite true that the voters are the channel through which we necessarily obtain an expression of the popular will, but a majority of the voters are not necessarily the people and do not at all times represent the real wishes of the people.

The majority of those who vote on any given question may be a very narrow one. It may be a very ephemeral one. The majority of one year may be the minority of the next, and yet you will observe that in all the practical arrangements for the compulsory initiative and referendum and for the recall of judges the people who can compel the initiative and who in practice carry the referendum, the number who can force a recall and who, in its practical operation, may be able to carry it, are but a small minority of the voters. To start the initiative or the recall, in all the provisions that I have seen, only a minority, sometimes a very small percentage, of those who voted at the last election is required. When the act asked for has been adopted by the legislature and referred, it appears, if experience is of any value, that a large proportion of the voters express no opinion, either from indifference or from not comprehending the question, while the small and interested minority take pains to vote for the law, the submission of which to the voters has been compelled by their original action. The result is that laws are placed upon the statute book without any sufficient evidence that they are there—I will not say by

the will of the people, but even by the will of the majority of the registered voters. A small minority of the voters would be generally effective under these methods, and of course a small minority of the voters is a still smaller minority of the people, for the voters themselves are a comparatively small minority of the whole people. Therefore it is important to bear in mind that when it is proposed to make the Government more directly a government of the people, what is intended is to make the Government more clearly responsive and more absolutely under the control of the majority of the voters, whether that majority is large or small. Also it is to be remembered that this will result in the destruction of representative government, about which I shall have something to say later on, and it is the substitution of the will of a portion of the voters for the will of all the voters who are now represented by the legislative bodies. I can not express my meaning better than by quoting from a distinguished ex-president of this university, who says in his book on Constitutional Government, published in 1908:

> There are many evidences that we are losing confidence in our State legislatures, and yet it is evident that it is through them that we attempt all the more intimate measures of self-government. To lose faith in them is to lose faith in our very system of government, and that is a very serious matter. It is this loss of confidence in our legislatures that has led our people to give so much heed to the radical suggestions of change made by those who advocate the use of the initiative and the referendum in our processes of legislation, *the virtual abandonment of the representative principle*,[1] and the attempt to put into the hands of the voters themselves the power to initiate and negative laws, in order to enable them to do for themselves what they have not been able to get satisfactorily done through the representatives they have hitherto chosen to act for them.

In the same way, when we come to the consideration of the Constitution, upon which I am to have the honor to speak to you to-night, it is important to know just what we mean by a "constitution." A constitution in its proper significance, as I understand it, is a declaration of certain broad principles upon which government must be based and by which laws are to be tested. The people with great deliberation agree upon these general principles, submitted to them by men capable of defining and formulating them, and then they are adopted by the voters after long consideration and debate. They are not put beyond the possibility of change, as we are told was the case with the laws of Lycurgus, but change or amendment of the instrument are provided for under conditions which not only make alteration difficult but which are framed to secure as nearly as possible the expression of the will of an overwhelming majority of the voters who represent the people. Laws which are subsequently passed by the legislative bodies called into being by the constitution are to be tested and tried by the general principles which the people have established as the foundation of all government. In this country we have fallen into the bad habit in most of the States of placing in constitutions provisions which should be the subject of laws and statutes and which have no relation to general principles. The effect of this has been extremely unfortunate, for it has caused a widespread feeling that constitutions do not differ from laws; that they may deal with any subject and be the receptacle of any ideas which

[1] NOTE.—The italics are mine.

at the moment happen to be popular. This involves not only a complete misapprehension of the true purposes of the constitution, but tends to destroy the sanctity which an instrument embodying great general principles of government ought always to possess. I can not put the point which I have been trying to make better than by quoting again the former distinguished president of this university. In a work entitled "The State," in section 896, dealing with this habit of regarding the constitution as if it was an ordinary law, Mr. Wilson says:

> The objections to the practice are as obvious as they are weighty. General outlines of organization, such as the Constitution of the United States contains, may be made to stand without essential alteration for long periods together, but in proportion as constitutions make provision for interests whose aspects must change from time to time with changing circumstances they enter the domain of such law as must be subject to constant modification and adaptation. Not only must the distinctions between constitutional and ordinary law hitherto recognized and valued tend to be fatally obscured, but the much to be desired stability of constitutional provisions must in great part be sacrificed. Those constitutions which contain the largest amount of extraneous matter, which does not concern at all the structure or functions of government, but only private or particular interests, must, of course, however carefully drawn, prove subject to most frequent change. In some of our States, accordingly, constitutions have been as often changed as important statutes. The danger is that constitution making will become with us only a cumbrous mode of legislation.

The Constitution of the United States, which Mr. Wilson cites, is a true representative of what a constitution should be. It contains only general principles, with provisions merely for the machinery necessary to carry on the Government based on those general principles. The first ten amendments to the Constitution, adopted immediately after its ratification by the required number of States, are in reality a bill of rights and were placed there as the famous bill of rights was placed in the statute book of England and as the bill of rights was placed in the constitution of 1780 of Massachusetts, a constitution which still endures, with the view of protecting the rights of the individual man and of the minority against the possible tyranny of the majority. Lord Acton, in his History of Freedom, in one of the essays on liberty, says:

> The most certain test by which we judge whether a country is really free is the amount of security enjoyed by minorities.

The Constitution of the United States, with its first ten amendments, meets that severe test more successfully, I believe, than any constitution ever framed by man. Let me quote once more the same eminent authority in history as to what we accomplished in America when we framed the Constitution of the United States.

> American independence was the beginning of a new era, not merely as a revival of the Revolution, but because no other revolution ever proceeded from so slight a cause or was ever conducted with so much moderation. The European monarchies supported it. The greatest statesmen in England averred that it was just. It established a pure democracy, but it was democracy in its highest perfection, armed and vigilant, less against aristocracy and monarchy than against its own weakness and excess. Whilst England was admired for the safeguards with which, in the course of many centuries, it had fortified liberty against the power of the crown, America appeared still more worthy of admiration for the safeguards which, in the deliberations of a single memorable year, it had set up against the power of its own sovereign people. It resembled no other known democracy, for it respected freedom, authority, and

law. It resembled no other constitution, for it was contained in half a dozen intelligible articles. Ancient Europe opened its mind to two new ideas—that revolution with very little provocation may be just and that democracy in very large dimensions may be safe.

No greater tribute than this has ever been paid to the Constitution of the United States and it is all stated with the precision and the weight of a profound student of human history. What he says of our Constitution follows an essay upon "Freedom in antiquity," in which he sketches the rise and fall of Athenian democracy, the gradual departure from the laws of Solon, the development of legislation by direct popular vote, and the removal of all limitations upon the power and action of the majority. Let me read to you the words in which Lord Acton sums up the result:

> The philosophy that was then in the ascendant taught them that there is no law superior to that of the State—the lawgiver is above the law.
>
> It followed that the sovereign people had a right to do whatever was within its power, and was bound by no rule of right or wrong but its own judgment of expediency. On a memorable occasion the assembled Athenians declared it monstrous that they should be prevented from doing whatever they chose. No force that existed could restrain them; and they resolved that no duty should restrain them, and that they would be bound by no laws that were not of their own making. In this way the emancipated people of Athens became a tyrant; and their Government, the pioneer of European freedom, stands condemned with a terrible unanimity by all the wisest of the ancients. They ruined their city by attempting to conduct war by debate in the market place. Like the French Republic, they put their unsuccessful commanders to death. They treated their dependencies with such injustice that they lost their maritime Empire. They plundered the rich until the rich conspired with the public enemy, and they crowned their guilt by the martyrdom of Socrates.
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> When the absolute sway of numbers had endured for near a quarter of a century, nothing but bare existence was left for the State to lose; and the Athenians, wearied and despondent, confessed the true cause of their ruin. * * * The repentance of the Athenians came too late to save the Republic. But the lesson of their experience endures for all times, for it teaches that government by the whole people, being the government of the most numerous and most powerful class, is an evil of the same nature as unmixed monarchy, and requires, for nearly the same reasons, institutions that shall protect it against itself, and shall uphold the permanent reign of law against arbitrary revolutions of opinion.

My purpose in citing this passage from Lord Acton is not to remind you of the failure of Athenian democracy, but to call to your attention, what it is of the utmost importance to remember in the discussion in which we are engaged, and that is that the propositions now offered for changing our system of government and our Constitution are all very old. Legislation by direct popular vote was familiar to the Athenians and you have but to read "The Republic" and the "Laws" of Plato and the "Politics" of Aristotle to find out that there are scarcely any ideas in regard to government which were not developed and discussed by the Greeks, men of perhaps the highest intelligence which the world has ever seen. In the same way, legislation by direct popular vote coupled with the veto of the Tribunes of the people, was practiced in Rome and the outcome is familiar to all the world. The result was the despotism of the Cæsars. The one great contribution of modern times to the science of government has been the representative system. There were hesitating steps taken in that direction during the Middle Ages, but the real development of the representative principle was effected in England and has been the glory of the English-speaking race. Representative

government, in other words, stood for a great advance over the democratic systems of Greece and Rome and of the medieval Italian cities. I am not now concerned to show from history which system was the more successful. I merely desire at this point to call your attention to the fact that, while it might be better or worse to adopt legislation by direct vote as a substitute for representative government, there can be no question whatever that to abandon representative government and take up in its place legislation by direct vote is to return from a high stage of evolution to a lower and more primitive one. The life of the amœba may be a better life and a more enviable one than that of the elephant, for example, but there can be no question that the amœba is a lower stage in the scale of evolution than is the elephant.

There is therefore nothing new in these propositions as to legislation by direct vote, and if we examine the scheme for the recall of judges we shall see that there is nothing novel in that idea either, for not only has control of the courts by the sovereign authority been familiar at all stages of history, but the actual practice of judicial recall was attempted in France during the Revolution of 1848. The provisional government made the judges removable at pleasure, and if you will take the trouble to read the manifestoes issued by Ledru-Rollin you will see how he asks the voters to let him know if any judge does not behave in accordance with their wishes, so that he may remove the peccant magistrate, and he further calls attention to the fact that the judges are on the bench simply to do the popular will. They had also, at the time of that Revolution in 1848, not only this control of the judges under the provisional government, but also the "mandat imperatif" and government workshops. I will only pause long enough to say that the result of those experiments in France was the plebiscite and the Third Napoleon. Representative government and liberty faded away together and the executive became all powerful. Therefore I repeat that in these propositions now made to us there is nothing new. They are old propositions. We are to-day asked to lay aside the great advance in government made, as history shows, by the representative system and return to earlier forms.

Let us first consider the compulsory initiative and referendum in their practical working. One of the great arguments used by the advocates of these changes in our Constitution is that by obtaining the direct action of the voters we shall be free from the demoralizing influence and from the control of money in politics and in our legislatures. In the alterations, so generally made of late in our election laws in order to compel nominations to be made in popular primaries, we have an opportunity to test the claim which has been advanced in favor of these reforms, that we should thereby rid ourselves of the influence of money. The method of choosing executive officers or members of the legislature is an alteration only in the mechanism of government, although I personally think that many of these changes are and have proved to be injurious and not beneficial. But none the less these primary systems afford us, as I have just said, an excellent opportunity of testing the question of the use of money under a system of direct popular action. I have always believed theoretically that the more elections and elective offices were multiplied, and the more elaborate the machinery for selecting and electing candidates, the

larger the field for professional politicians and for the employment of money to control election results. The evidence afforded by the primary system in actual operation seems to confirm this theory. In the contest which has arisen over the seat of Senator Stephenson, of Wisconsin, where the primary system is in full operation, some interesting facts have been brought out. It appears that in 1909, at the time when Senator Stephenson was nominated in the primaries, the expenditures at the primary election by all candidates, exclusive of the amounts spent by the senatorial candidates, is conservatively estimated on the returns required by law at $610,174, and if the amount expended by all the senatorial candidates be added the total amount spent in those primary elections comes to $802,659, while the total vote, Republican and Democratic, was 230,291. In other words, it cost $3.48 per vote to get that number of voters to the polls, and I believe that I am right in saying that only about one-half of the Republican vote of the State was actually polled in the primaries. Nothing in the past under the old convention system has equaled this really appalling expenditure at the primaries in a single year and in a single State. From this evidence of the primaries, what reason have we to hope that money will not play an enormous part in securing the initiation, the reference, and the adoption of any adroitly drawn laws which the great money interests may happen to desire?

The practical workings of the compulsory initiative and the compulsory referendum need not detain us long, for the effect of those devices is obvious enough. The entire virtue or the entire vice—each of us may use the word he prefers—of these schemes rests in the word "compulsory." The initiative without compulsion is complete in the right of petition secured by the first of the first ten amendments to the Constitution, which really constituted a bill of rights. The right of petition became the subject of bitter controversy at a later time and was vindicated once for all by John Quincy Adams's great battle in its behalf, more than three-quarters of a century ago. There are few instances where petitions representing a genuine popular demand have not met a response in action, whether in Congress or in the State legislatures; still fewer where respectful attention and consideration have not been accorded to them. But the responsibility for action and the form such action should take has rested with the representative body. When the initiative is made compulsory a radical change is effected. As I have already pointed out, a minority, sometimes a small minority of the voters, always a small minority of the people, can compel the legislature to pass a law and submit it to the voters even when a very large majority of the people neither ask for nor, so far as the evidence goes, desire it. In this way all responsibility is taken from the representative body and they become mere clerks for drafting and recording laws, poor puppets who move mechanically when some irresponsible outsiders twitch the strings. It is the substitution of government by factions and fractions for government by the people. The representative body as hitherto constituted represented the whole people. Under the new plan it is to be merely the helpless instrument of a minority, perhaps a very small minority, of the voters.

The voluntary referendum has always existed in this country. In the National Government, owing to our dual or Federal form, the referendum on constitutional amendments is necessarily made to

the States and it has never been suggested for the laws of the United States, owing to both physical and constitutional difficulties. In the States the referendum has always been freely used, not only for constitutions and constitutional amendments but for laws, especially for city charters, local franchises, and the like. But if, on the demand of a minority of the voters, the referendum is made compulsory, all responsibility vanishes from the representative body. The representative no longer seeks to represent the whole people or even his own constituency, but simply votes to refer everything to the voters, and covers himself completely by pointing to the compulsory referendum. On the other hand, the voters are called upon to legislate. Of the mass of measures submitted they know and can know nothing. Experience shows that in all referendums a large proportion of the voters decline to vote. Whether this is due to indifference or to lack of information the result is the same. It proves that this system demands from the voters what the most intelligent voters in the world are unable to give. They are required to pass upon laws, many of which they have neither time nor opportunity to understand, without deliberation and without any discussion except what they can gather from the campaign orator, who is, as a rule, interested in other matters, or from an occasional article in a newspaper. They can not alter or amend. They must vote categorically "yes" or "no." The majority either fails to vote, and the small and interested minority carries its measure, or the majority, in disgust, votes down all measures submitted, good and bad alike, because they do not understand them and will not vote without knowing what their votes mean.

Look, now, for a moment at representative government as we ourselves have known it. Let us not forget, in the first place, that the Congress of the United States under the Constitution has been in continuous existence for more than 120 years; that with the single exception of the "Mother of Parliaments" it is much the oldest representative body of a constitutional character now existing in the world. Let us also remember that the history of the American Congress is in large part the history of the United States, and that we are apt to be proud of that history as a whole and of the many great things we as a people have accomplished. Yet whatever praise history accords to the Congress of the United States in the past the Congress of the moment and the Members of that body in either branch receive but little commendation from their contemporaries. This is perhaps not unnatural, and it certainly has always been customary. Legislative bodies have rarely touched the popular imagination or appeared in a dramatic or picturesque attitude. The Conscript Fathers, facing in silence the oncoming barbarians of Gaul; Charles the First attempting to arrest the five members; the Continental Congress adopting the Declaration of Independence; the famous Oath of the Tennis Court are almost the only instances which readily occur to one's mind of representative and legislative bodies upon whom for a brief instant has rested the halo of heroism and from which comes a strong appeal to the imagination. The men who fight by land and sea rouse immediate popular enthusiasm, but a body of men engaged in legislation does not and can not offer the fascination or the attraction which are inseparable from the individual man who stands forth alone from the crowd in any great work of life, whether of war or peace.

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We may accept without complaint this tendency of human nature, but I think every dispassionate student of history, as well as every man who has had a share in the work of legislation, may rightfully deprecate the indiscriminate censure and the consistent belittling which pursue legislative bodies. This attitude of mind is not confined to the United States. The press of England treats its Parliament severely enough, although on the whole with more respect than is the case with the American press in regard to the American Congress. But running through English novels and essays we find as a rule the same sneer at the representatives of the people as we do here. Very generally, both in this country and abroad, those who write for the public seem to start with the proposition that to be a Member of Congress or a member of Parliament or a member of the Chamber of Deputies in France implies some necessary inferiority of mind or character. I do not desire to be rash or violent, but I think this theory deserves a moment's examination and is, perhaps, open to some doubt. As Mr. Reed once said, it is a fair inference that a man who can impress himself upon 200,000 people or upon the whole population of a great State sufficiently to induce them to send him to the House or Senate has something more than ordinary qualities and something more than ordinary force. Then, again, as Edmund Burke remarked, you can not draw an indictment against a whole people, nor, I may add, can you draw an indictment against an entire class. There are good men and bad men in business and in the professions, in the ministry, in medicine, in law, and among scholars. Virtue is not determined by occupation. There are, I repeat, good and bad men in every profession and calling, among high and low, rich and poor, and the honest men who mean to do right largely preponderate, for if they did not the whole social structure would come crashing to the ground.

What is true of business and the professions is true of Congress. There are good and bad men in public life, and the proportion of good to bad, I believe, compares favorably with that of any other occupation. Public men live in the fierce light which beats upon them as upon a throne, a light never fiercer or more pitiless than now, and for this reason their shortcomings are made more glaring and their virtues by contrast more shadowed than in private life. This is as it should be, for the man who does wrong in private life is far less harmful than the public servant who is false to his trust. To inflict upon the public servant who is a wrongdoer the severest reprobation is necessary for the protection of the community, but for this very reason we should be extremely careful that no reprobation should be visited unjustly on any public man. It is an evil thing to betray the public trust, but it is an equally evil thing to pour wholesale condemnation upon the head of every man in public life, good and bad alike. That which suffers most from an injustice like this in the long run is not the public servant who has been unfairly dealt with, for the individual passes quickly, but the country itself. After all, the voters make the Representatives. If he is not of the highest type, he appears to be that which the majority prefers. Wholesale criticism and abuse of the Representatives reflect more on the constituencies, if we stop to consider, than on those whom the constituencies select to represent them. Indiscriminate condemnation and equally indiscrimi-

nate belittling of the men who make and execute our laws, whether in State or Nation, is not only a reflection upon the American people, but is a blow to the United States and every State in it. They help the guilty to escape and injure the honest and the innocent. They destroy the people's confidence in their own Government and lower the country in the eyes of foreign nations.

The Congress of the United States embodies the representative principle. The principle of representation, I repeat, has been the great contribution of the English-speaking race to the science and practice of government. The Greeks and the Romans, let me say once more, had pure democracy and legislation by direct vote in theory, at least. Greece failed to establish an empire; she touched the highest peaks of civilization, and finally went to pieces politically beneath the onset of Rome. Rome established a great empire, but, after years of bloody struggles between aristocracy and democracy, ended in a simple despotism. The free cities of Italy oscillated between anarchy and tyranny, only to fall victims in the end to foreign masters. In Florence they had elections every three months and a complication of committees and councils to interpret the popular will. Yet the result was the Medicis and the Hapsburgs.

It is also to be remembered that the representative principle has been coincident with political liberty. Whatever its shortcomings or defects, and, like all things human, it has its grave defects, it none the less remains true that the first care of every "strong man," every "savior of society," every "man on horseback," of every autocrat, is either to paralyze or to destroy the representative principle. It may be that the representative principle is not the cause of political liberty, but there can be no question whatever that the two have always gone hand in hand and that the destruction of one has been the signal for the downfall of the other. The Congress of the United States and the legislatures of the several States embody the representative principle. By that principle your laws have been made and the republican form of government sustained for more than a century. Whatever its shortcomings, it has maintained the Government of the United States and upheld law and order throughout our borders.

With such a history, and typifying as it does the great doctrines which were embodied in the Declaration of Independence, the Constitution of the United States, and the institutions of England, it may fairly be asked that if the representative principle must be criticized, as it should be with severity when it errs, it should also be treated with that absolute justice which is not only right in the abstract but which is essential to the maintenance of law, order, and free government, to human progress and to the protection of the weak, even as the fathers designed that it should be. When we blame its failures let us not forget its services. They have broadened freedom down from precedent to precedent. They shine across those pages of history which tell the great story of the advance of liberty and of the ever-widening humanity which seeks to make the world better and happier for those who most need happiness and well-being. In beneficent results for the people at large no other form of government ever attempted can compare with it for a moment.

The worst feature of the compulsory initiative and referendum lies therefore in the destruction of the principle of representation.

Power without responsibility is a menace to freedom and good government. Responsibility without power is inconceivable, for no man in his senses would bear such a burden. But when responsibility and power are both taken away, whether from the executive or the representatives, the result is simple inanition. No man fit by ability and character to be a representative would accept the office under such humiliating conditions. Those who accepted it would do so for the pecuniary reward which the office carried and would sink rapidly into mere machines of record, neither knowing nor caring what they did. With a representative body thus reduced to nothingness we are left with the people, armed only with their votes, and with an executive who has necessarily absorbed all the real powers of the State. This situation is an old story and has always ended in the same way. It presents one of those rare cases in which the teaching of history is uniform. When the representative principle has departed and only its ghost remains to haunt the Capitol, liberty has not lingered long beside its grave. The rise of the representative principle and its spread to new lands to-day marks the rise of popular government everywhere. Wherever it has been betrayed or cast down the government has reverted to despotism. When representative government has perished freedom has not long survived.

All these plans to make the people carry on their governments by impracticable methods are not only unjust and dangerous to the people and to the public welfare, but they tend to bring all popular government into discredit. Do not misunderstand me. I attach no superstitious reverence to forms of government. I make no fetich of laws and constitutions, for constitutions are made for men, not men for constitutions. I have no patience with the theory held by some persons, and often pernicious in its activity, that human nature can be changed and all men made virtuous and happy by statute. People, according to my observation, get in the long run the government they desire and deserve, and if they suffer from bad government, it is because they are too inert or too incapable or too timid or perhaps too corrupt to secure anything better. Government and the success of government in the last analysis depend on the character of the people themselves. People with a high capacity for self-government will make a bad system work well, or at least tolerably well, while people without that capacity will come to confusion and ruin under the most ideally perfect system which the wit of man can devise. But while it is profoundly true that people make laws, not laws people, the importance and effect of laws, constitutions, and political institutions are none the less very great. The essential point is to comprehend in what that importance consists and to gauge rightly the effect and educational force of laws and constitutions: in a word, to realize what laws can and what they can not do. We must not forget that if statutes can not change the laws of nature, it is equally a mistake to accept the Quietist doctrine of Pope when he said in his familiar lines:

> For forms of government let fools contest;
> Whate'er is best administered is best.

Allow me now to illustrate my meaning. Wise economic laws affecting the currency or the tariff can not of themselves make prosperity. They can help very greatly to bring prosperity if a people be

energetic and industrious and other conditions are favorable, but alone they can not do it. On the other hand, bad economic laws, especially such as affect the circulating medium, can unaided and alone bring panic and disaster. To state this as a general proposition, we may say that while the effect of good economic laws for good is limited, the effect of bad economic laws for evil is unlimited. The power of economic statutes to injure is much greater than their power to benefit. This rule applies not only to all economic legislation, but to all laws. There is no panacea for human ills to be found in statutes. Statutes may help greatly; they may and do modify and alleviate and improve evil conditions, but there their possibilities end, and many misfortunes have happened to mankind from the mistaken conception of the possibility of statute making. On the other hand, the power of bad laws to bring on ruin, disaster, civil strife, and the downfall of governments and nations is practically unbounded. It is, then, of the last importance to consider carefully what the full effect of any law will be, and not open the door, for the sake of an apparent remedy for some special evil, to a thousand worse evils which might involve all in a common disaster. Laws, therefore, not only assume a vast importance, but also the methods and instrumentalities by which they are made. Good laws are not to be expected if you impose conditions upon their making incompatible with good results. The best glazier in the world can not cut a square of glass if you insist that he shall do it with a broadax or a pointed stick. Under such conditions he would merely smash the glass, and you and not he would be to blame. You must give him a diamond point, and you will get your window pane. You can impose conditions on a people under which it will be impossible for them to secure good legislation, and it will not be any reflection upon them or their capacity for self-government if they bring forth laws which work a ruin and disaster as widespread as they are needless. It shows no more distrust to insist that the people shall use wise and well-tried methods of legislation to obtain the laws they desire than it shows distrust of the glazier to insist that he shall use a proper tool to cut his square of glass.

I trust the people fully. I believe, what the advocates of the initiative and referendum deny, that they are able to choose their own representatives and to control them. I do not think the people are so weak or so stupid that they can not choose men who will fitly represent them, and that they can not reject their representatives if those representatives do not perform their duties. I think the people are eminently capable of governing themselves by proper methods, and that their power should not be distorted and crippled by impossible devices. But the great and fundamental objection to the compulsory initiative and referendum is the destruction of the representative principle which they necessarily involve. When that is broken down nothing remains but the executive and the courts. With the representatives deprived of power the courts would not long retain their independence, and when the executive department alone survives we are well on the road to despotism. The resort to the Plebiscite is the favorite device of the usurper and savior of society. His opportunity comes when disorder, license, and wild legislation have driven the mass of men to a readiness to sacrifice liberty in the determination to have peace and order, a sad and desperate situation, familiar, unhappily, in the world's history. Moreover, the

advent of the strong man and the army are always coincident with the breaking down of representative government. What we want above all things is to preserve the representative bodies which have ever been the guardians of freedom and of popular liberties in this country. I trust the people so thoroughly that I believe they can conduct their Government with honor and success, as they have done for so many generations. Times change and conditions change with them. We must meet the new times and the change in conditions with the legislation which they demand, but in dealing with our new problems it is not necessary to cast away the instruments by which every reform and every improvement has hitherto been effected. I am not one of those who believe that all wisdom died with our forefathers. I am equally far from believing that all wisdom was born yesterday. This is not a new question, but involves the oldest theories of government, and here, if anywhere, history and experience are safe and illuminating guides which only ignorance and folly would neglect or disregard. The great men who framed our Constitution provided both in State and Nation for checks and balances because they believed that the rights of the people could only be protected if every possible safeguard was thrown around the lawmaking power. They believed that that power ought only to be exercised with the utmost care and deliberation, and in seeking that care and deliberation they believed that they were protecting the rights of the people. They saw in hasty legislation great perils, and they never had the slightest fear that the legislative body would not respond quickly enough to the popular wishes. They had a great dread of executive power and a deep desire to protect the rights of minorities. The majority, they believed, ought to rule, but they wished to be very sure that majority rule should not be rashly or hastily exercised. They wished the members of a majority always to remember that they might find themselves any day in a minority, and therefore they took the utmost pains to secure every opportunity in legislation for debate and amendment.

Most serious, most fatal indeed are the dangers threatened by the insidious and revolutionary changes which it is proposed to make in our representative system, upon which the makers of the Constitution relied as one of the great buttresses of the political fabric which was to insure to popular government, success and stability. Yet even these changes are less ruinous to the body politic, to liberty and order, than that which proposes to subject judges to the recall. No graver question has ever confronted the American people.

The men who framed the Constitution were much nearer to the time when there was no such thing as an independent judiciary than we are now. The bad old days, when judges did the bidding of the King, were much more vivid to them than to us. What is a commonplace to us was to them a comparatively recent and a hardly won triumph. The fathers of some of those men—the grandfathers of all—could recall Jeffreys and the "Bloody Assize." They knew well that there could be no real freedom, no security for personal liberty, no justice, without independent judges. It was for this reason that they established the judiciary of the United States with a tenure which was to last during good behavior and made them irremovable except by impeachment. The Supreme Court then created and the judiciary which followed have, as I have already said, excited the

admiration of the civilized world. The makers of the Constitution believed that there should be no power capable of deflecting a judge from the declaration of his honest belief, no threat of personal loss, no promise of future emolument, which could be held over him in order to sway his opinion. This conviction was ingrained and born with them, as natural to them as the air they breathed, as vital as their personal honor. How could it have been otherwise? The independence of the judiciary is one of the great landmarks in the long struggle which resulted in the political and personal freedom of the English-speaking people. The battle was fought out on English soil. If you will turn to the closing scenes of Henry IV, you will find there one of the noblest conceptions of the judicial office in the olden time ever expressed in literature. It was written in the days of the last Tudor or of the first Stuart, in the time of the Star Chamber, of judges who decided at the pleasure of the King and when Francis Bacon, Lord Chancellor of England, took bribes or gifts. Yet lofty as is the conception, you will see that Shakespeare regarded the judge as embodying the person, the will, and the authority of the King.

We all know how the first two Stuarts used the courts to punish their enemies and to prevent the assertion of political rights, which are now such commonplaces that the fact that they were ever questioned is forgotten. The tyranny of the courts was one of the chief causes which led to the great rebellion, and out of that great rebellion, when the third Stuart had been restored, came the habeas corpus act, which has done more to protect personal liberty than any act ever passed. But the second Charles and the second James had learned nothing as to the judges. They expected them to do their bidding when the King had any interest at stake, and under the last Stuart the courts reached a very low point and the legal history of the time is characterized by the evil name of Jeffreys. When the lawyers went to pay their homage to William of Orange, they were headed by Sergt. Maynard, then 90 years of age. "Mr. Sergeant," said the prince, "you must have survived all the lawyers of your standing." "Yes, sir," said the old man, "and, but for Your Highness, I should have survived the laws too." The condition of the courts was indeed one of the strongest of the many bitter grievances which wrought the Revolution that placed William of Orange on the English throne. In the famous bill of rights there is no provision in regard to the courts, and it is not quite clear why it was omitted, although, apparently, it was due to an oversight. In any event it was not forgotten. It was brought forward more than once in Parliament, but William announced that he would not assent to any act making the judges independent of the Crown. As his reign drew toward its close, however, he signified that although he would veto a separate act he would accept the independence of the judiciary if provided for in the act of settlement which was to determine the succession to the throne of England. Therefore we find in the act of settlement the clause which declares that the judges shall hold office during good behavior—"quamdiu se bene gesserint"—and shall be removable only on the request of both houses of Parliament.

It is necessary to pause a moment here and consider briefly the provision of the act of settlement for the removal of judges on an address by the houses, because it has been most incorrectly used by

persons ignorant probably of its history as a precedent justifying the recall. The clause was inserted not for the purpose of controlling the judges but to protect them still further against the power of the Crown by which they had hitherto been dominated. The history of the clause since its enactment demonstrates what its purpose was as well as the fulfillment of that purpose in practice. During the two centuries which have elapsed since William III gave his assent to the act there has been, so far as I can learn, only one removal on address, that of Sir Jonah Barrington, an Irish judge, in 1806, more than a hundred years ago. There have been several cases where removal was petitioned for, but Barrington's was, I think, the only one in which the demand was successful. The procedure employed shows that there is no resemblance whatever between the removal of a judge upon the address of the lawmaking body and the popular recall. They are utterly different, instituted for different purposes, and the former furnishes in reality a strong argument against the latter. In all the cases of removal or attempted removal by address of Parliament the accused judge was carefully tried before a special committee of each house; he could be heard at the bar of either house, he could and did employ counsel, and could summon and cross-examine witnesses. This process is as far removed from the recall as the zenith from the nadir, for under the recall the accused judge has no opportunity to summon or cross-examine witnesses, to appear by counsel, or to be properly heard and tried. He is obliged under the recall to make an appeal by the usual political methods and at the same time to withstand another candidate, while he is forced to seek a hearing from audiences ignorant of the law and inflamed against him perhaps by passion and prejudice. He has no chance whatever of a fair trial.

Some of our States borrowed this provision of the act of settlement when they formed their constitutions. My own State of Massachusetts was one of them. The power has been but rarely exercised by the legislature during the hundred and thirty years which have passed since the Massachusetts constitution was adopted, but it so happened that when I was in the legislature a case occurred, and I was a member of the committee on the judiciary to whom the petitions were referred. The accused judge was tried as elaborately and fairly as he could have been by any court or by the Senate if he had been impeached. He had counsel, he summoned and cross-examined witnesses, and the trial, for it was nothing less, occupied weeks. The committee reported in favor of removal, but the house rejected the committee's report. Some years later, after a similar trial, the address passed both houses and the judge was removed by the governor for misdemeanors and malfeasance in office. A mere statement of the procedure shows at once that the removal by address is simply a summary form of impeachment with no relation or likeness to the recall. Removal by address is no more like the recall than impeachment is. If successful, they all result in the retirement of the judge accused, but there the resemblance ends. The makers of the Constitution did not follow the act of settlement and adopt the removal on address. They no doubt perceived its advantages, because it made possible the removal of a judge incapacitated by insanity or age or disease without inflicting upon him the stigma of an impeachment, but they also saw that the removal by address might be used for political and personal reasons, of which one instance occurred in

my own State, and they probably determined that the risk of its abuse outweighed any possible benefit which might flow from its judicious exercise.

They placed their courts as far as they could on the great heights of justice, above the gusts of popular passion. They guarded them in every possible way. They knew that judges were human and therefore fallible. They knew that the courts would move more slowly than popular opinion or than Congress, but they felt equally sure that they would in the end follow that public opinion which was at once settled and well considered. All this they did because all history and especially the history and tradition of their own race taught them that the strongest bulwark of individual freedom and of human rights was to be found ultimately in an independent court, the corner stone of all liberty. Their ancestors had saved the judges from the Crown. They would not retrace their steps and make them subject to the anger or the whim of anyone else.

> They wished men to be free,
> As much from mobs as kings,
> From you as me.

The problem which they then solved has in no wise changed. The independence of the judiciary is as vital to free institutions now as then. The system which our forefathers adopted has worked admirably and has commanded the applause of their children and of foreign nations, who Bacon tells us are a present posterity. Now it is proposed to tear this all down and to replace the decisions of the court with the judgment of the market place. If I may borrow a phrase from the brilliant speech made recently by Mr. Littleton in the House, it is intended to substitute "government by tumult for government by law."

Those who advocate this revolution in our system of government seem to think that a judge should be made responsive to the popular will, to the fleeting majority of one day which may be a minority the next. They would make their judges servile, and servile judges are a menace to freedom, no matter to whom their servitude is due. They talk of a judge's duty to his constituents. A judge on the bench has no constituents and represents no one. He is there to administer justice. He is there not to make laws, but to decide what the law is. He must know neither friend nor foe. He is there to declare the law and to do justice between man and man. The advocates of the recall seem to believe that with subservient judges glancing timidly to right and left to learn what voters think, instead of looking steadfastly at the tables of the law, the poor will profit and the rich will suffer; that the individual will win and the corporation lose; that the powerful will be crushed and the weak will triumph, while the sword of the recall hangs over the head of the judicial Damocles. If even this were true, nothing could be more fatal. A judge must know neither rich nor poor, neither strong nor weak. He must know only law and justice. He must never listen to Bassanio's appeal, "To do a great right, do a little wrong." But the theory is in reality most lamentably false. No man fit to be a judge would, with few exceptions, take office under the recall. In the end the bench would be filled by the weak and the unscrupulous. The weak would make decisions to curry favor and hold votes. The unscrupulous would use their brief opportunity to assure their own fortunes, and that assurance could come only from

the rich and the powerful, who would thus control the decisions. For the American court we should substitute the oriental cadi, with the bribe giver whispering in his ear. If a criminal happened to belong to some large and powerful organization in whose interest the crime was committed, he would have little to fear from a court where a judge subject to the recall presided. We should have courts like those ruled by the Camorra in the days of the Neapolitan Bourbons, except that the subservience of the judge would be insured by fear of the recall instead of by dread of assassination. The result would be the same, and certain criminals would become a privileged class and commit their crimes with impunity.

In one of the noblest passages of his letter to the sheriffs of Bristol Edmund Burke says:

> The poorest being that crawls on earth contending to save itself from injustice and oppression is an object respectable in the eyes of God and man.

Without the independent judge those words could never have been written, for before the independent judge alone could the poorest being hope to contend against injustice. Judges, of course, are human and therefore err. I know well that there have been one or two great cases where the decision of the highest court traveling beyond its province has been reversed and swept away by the overwhelming force of public opinion and the irresistible current of events. I know only too well that we suffer from the abuse of technicalities, from delays which are often a denial of justice, and that the methods of our criminal law are in many States a disgrace to civilization. But all these delays and abuses and miscarriages of justice are within the reach of Congress and legislatures, and these evils can be remedied by statute whenever public opinion demands a reform. Their continued existence is our own fault. Yet when all is said the errors of the highest courts are few and the abuses and shortcomings to which I have referred can be cured by our own action. In the great mass of business, in the hundreds of trials which go on day by day and year by year, justice is done and the rights of all protected. We may declare with truth that in the courts as we have known them the poor, the weak, the helpless have found protection and sometimes their only defense. A mob might thunder at the gates, money might exert its utmost power, but there in the court room the judge could see only the law and justice. The safeguard of the rights and liberties of minorities and individuals, of the weak and above all of the unpopular, as a rule, has been found only in the court. And now it is proposed to undo all this and to make the judges immediately dependent on the will of those upon whom they must pass judgment. If the framers of the Constitution were alive to-day, they would not find a single new condition to affect their faith in an independent judiciary. They would decide now, as they decided then. Are we ready to reverse their judgment and open the door to the flood of evils which will rush into the State as they always have rushed in when in times past the courts were controlled by an outside power?

Let me in closing end where I began by once more calling your attention to the purpose and spirit of the Constitution of the United States. The immediate object of the men who met at Philadelphia in 1787 was to provide for a Union of the States in a General Government and for the adjustment of the relations between the General

Government thus created and the several States. The result in this direction was a very remarkable piece of work and has ever since commanded the admiration of the world. It was the application of the principles of federation on a scale and in a manner which made it practically a new achievement in the science of government and the fundamental questions growing out of the relations of the States to the General Government, which occupied in their discussion the first seventy years of our existence, and which culminated in a civil war, have been settled. No one to-day desires to disturb those relations as they have been finally determined and no change in them is sought by any of those who now urge reforms upon us.

The rest of the work in 1787 was the establishment and declaration of certain great principles upon which free government was to rest. In the Constitution itself the makers acted on the principle that the three great branches of government—the legislative, the executive, and the judicial—should be equal, independent, and coordinate. Their action carried out in practice the fundamental principle of free government, as I conceive it, which is expressed in the constitution of Massachusetts in specific words. Let me quote those words to you, for they are, as I believe, a very great and a very noble declaration. The thirtieth article of the constitution of Massachusetts says:

> In the government of this Commonwealth the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them, to the end it may be a government of laws and not of men.

That is one and perhaps the greatest of the principles embodied by its makers in the Constitution of the United States. But it is only one of many. In the first ten articles of amendment, without which the Constitution would never have been ratified by the necessary number of States, there is embodied, as I have said, a bill of rights, and in those ten amendments every line is a statement of a general principle. The bill of rights was intended to protect the rights of minorities and of individuals. The separation of the three great departments was meant to prevent the concentration of power, and all were intended to put limitations upon numerical majorities. The framers of the Constitution did not believe that any man or any body of men could safely be intrusted with unlimited power. They thought, and all experience justified them in thinking, that human nature could not support the temptation which unlimited power always brings. They had deeply ingrained the belief of the English-speaking people that the power of the King should be strictly limited. They felt that this great principle applied with equal force to ten thousand or ten million kings—in other words, to a popular majority of numbers. They established a representative democracy and a thoroughly popular government, but they thought that the "right divine of kings to govern wrong" was as false and dangerous a maxim when applied to many men called voters as when applied to one who happened to wear a crown.

The people, through their delegates, made the Constitution. They can unmake it. They can create and they destroy, but the destruction or the alteration must be the work of the people and not of a temporary majority of voters. It is for this reason that it is provided in the Constitution that amendment and change can only come by methods which insure, so far as possible, the expression of the

will of a steadfast and decisive if not overwhelming majority of the people. Two-thirds of their representatives in Congress and the Senate must vote for an amendment, and three-fourths of the States must adopt it. The British constitution puts limitations on the power of the Crown: the American Constitution puts limitations on the power of the majority of the voters. These limitations are to assure the preservation of the Constitution from any change which the people—the whole people and not merely a majority of voters—do not demand and to make it certain that there shall be no amendment except after ample consideration and by the most decisive expression of the people's will. If all these checks and balances, all these carefully devised safeguards which are to secure the people in their own government and to protect minorities and individuals, are to be swept away, then there is no need of any Constitution at all. General principles must then be cast to the winds, and we must hold our lives, our honor, our liberties, and our property at the will of a majority of numbers, narrow perhaps, fleeting, uncertain; here to-day and gone to-morrow, from which no man can gather assurance as to his future or as to his rights.

The most vital perhaps of all the great principles embodied in the Constitution is that of securing the absolute independence of the judiciary. Courts are human and they have erred, but bear in mind that this is a comparative world. As Dr. Johnson wisely said:

> In political regulations good can never be complete; it can only be predominant.

It is not a question of whether you are going to substitute for a system imperfect with some of the imperfections inherent in human nature another system absolutely perfect and final. The question to be decided is whether the system which is proposed is better than the system we have. The great Roman jurist, Ulpian, defined the law in a memorable phrase which was subsequently embodied in the Digest or Pandects of Justinian. Let me recall it to you:

> Justitia est constans et perpetua voluntas jus suum cuique tribuendi. Juris præcepta sunt hæc: honeste vivere, alterum non lædere, suum cuique tribuere. Jurisprudencia est divinarum atque humanarum rerum notitia, justi atque injusti scientia.

That is a great and noble conception of the law and one that it is well to bear in mind so that you may determine where it is most likely to be observed and held sacred whether it will be most surely found in the quiet of the court or among vast masses of men heated with political and party passion. In the long course of the centuries during which western civilization has been developed it has been proved again and again that whatever its defects there is nothing so essential, so vital to human rights and human liberty, as an independent court. Beware how you break down that principle because courts here and there have erred. Hard cases make the worst laws and bad laws are the breeders of anarchy and disorder. We must proceed, if we would proceed with safety and lasting results, on general principles; and if history proves anything it proves that the greatest safeguard of human rights in the long run is to be found in independent courts which can be swayed neither by the whisper of the bribe giver, by the clamor of the mob, by the command of the autocrat, or by the dark threats of secret organizations.

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